SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Joseph J. Esposito PART 17
Justice

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NIGEL GRANVILLE AND DEBRA WATSON GRANVILLE,

Plaintiffs,

- against -

SUMMIT GLORY PROPERTY, LLC, MARCH ASSOCIATES CONSTRUCTION INC., AND STATEWIDE CONTRACTING SERVICES, CORP.,

Defendants.

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Index No.: 701134/2020

Motion Date: 08/07/2024

Mot. Seq. No. 2 & 3 ~~3 and 4~~

The following numbered papers read on these motions: (1) the motion by the defendant Statewide Contracting Services, Corp. for summary judgment dismissing the complaint and all cross-claims asserted against it; and (2) the separate motion by the plaintiffs (a) for partial summary judgment as to liability so much of their Labor Law § 241 (6) claim asserted against the defendants Summit Glory Property LLC and March Associates Construction Inc. as is predicated on alleged violations of sections 23-1.7 (e) (1) and (e) (2) of the Industrial Code, (b) for summary judgment dismissing the first and third affirmative defenses asserted by the defendants Summit Glory Property LLC and March Associates Construction Inc., and (c) for summary judgment dismissing the first, second, third, fourth, ninth, and tenth affirmative defenses asserted by the defendant Statewide Contracting Services, Corp.

	Papers Numbered
Seq #2	
Notice of Motion – Affidavits – Exhibits	EF 49-62
Answering Affidavits – Exhibits	EF 140-143
Reply Affidavits	EF 144
Seq #3	
Notice of Motion – Affidavits – Exhibits	EF 63-90
Answering Affidavits – Exhibits	EF 100
Reply Affidavits	EF 139

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of a single order and are determined as follows:

This action is based on injuries that the plaintiff allegedly sustained on October 7, 2019, while working on a construction project in Manhattan. The construction project at issue involves a property that was being converted into a movie theater, and non-party Solar Electric Systems, Inc. (Solar Electric) was hired by the defendant March Associates Construction, Inc. (March Associates) to perform certain electrical installation work throughout the premises. The plaintiff Nigel Granville (the plaintiff) testified that he was employed by Solar Electric at the time of his accident and that he began working at the Manhattan project site in January 2019. The plaintiff further testified that from the time he began working there, he observed galvanized steel conduit pipes protruding from the floor in numerous places throughout the project site. According to the plaintiff, his accident occurred when he tripped on one of these pipes, causing him to fall forward and sustain injuries to his right hand.

The plaintiff, and his spouse suing derivatively, subsequently commenced this action against, among others, the defendant Summit Glory Property LLC (Summit), March Associates, and the defendant Statewide Contracting Services, Corp. (Statewide), asserting claims for common-law negligence and alleged violations of Labor Law §§ 240 (1), 241 (6), and 200. As is relevant here, Summit and March Associates collectively answered the amended complaint and asserted cross-claims for contractual indemnification, common-law indemnification, and contribution against Statewide.

Discovery having been completed, Statewide and the plaintiff separately move for summary judgment.

Statewide's motion (Sequence #2)

Statewide seeks summary judgment dismissing the complaint and all cross-claims asserted against it. With respect to the plaintiff's claims, Statewide asserts that it was not the owner of the property where the plaintiff was injured, was not the general contractor for the project, and was not an agent or owner of the general contractor. On this point, Statewide contends that it was not responsible for controlling the plaintiff's work and did not perform any work involving the conduit pipe that allegedly caused the plaintiff's accident. To the contrary, Statewide argues that its only role at the site was to demolish certain portions of the concrete slabs at the project site and make holes suitable for staircases and air ducts. This being the case, Statewide argues that it is not a proper Labor Law defendant and did not owe or breach a duty to the plaintiff.

Similarly, Statewide asserts that because it was not negligent, the cross-claims for common-law indemnification and contribution asserted against it should be dismissed. With respect to the contractual indemnification cross-claim, Statewide contends that, although the contract between March Associates and Statewide has an indemnification provision, this provision was not triggered by the plaintiff's accident because Statewide was not negligent.

The plaintiff's claims

Labor Law §§ 240 (1) and 241 (6)

" 'Labor Law §§ 240 (1) and 241 (6) apply to owners, contractors, and their agents' " (*Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 973 [2d Dept 2020], quoting *Fucci v Douglas S. Plotke, Jr.*, Inc., 124 AD3d 835, 836 [2d Dept 2015] [internal quotation marks omitted]). " 'A party is deemed to be an agent of an owner or general contractor under the Labor Law when [he or she] has supervisory control and authority over the work being done where a plaintiff is injured' " (*Navarra v Hannon*, 197 AD3d 474, 475 [2d Dept 2021], quoting *Sanders v Sanders-Morrow*, 177 AD3d 920, 922 [2d Dept 2019] [internal quotation marks omitted]; *see Medina v R.M. Resources*, 107 AD3d 859, 860 [2d Dept 2013]). "To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Delahaye v Saint Anns School*, 40 AD3d 679, 683 [2d Dept 2007]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). "However, where a separate prime contractor has been delegated the authority to supervise and control the plaintiff's work, the contractor 'becomes a statutory "agent" of the owner or general contractor' " (*Barrios v City of New York*, 75 AD3d 517, 518 [2d Dept 2010], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). "The determinative factor is whether the defendant had 'the right to exercise control over the work, not whether it actually exercised that right'" (*Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782, 784 [2d Dept 2021], quoting *Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000]).

Here, Statewide's submissions are sufficient to establish prima facie entitlement to summary judgment dismissing the plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims asserted against it, as the deposition testimony demonstrates that Statewide is not the owner, general contractor, or agent of the owner or general contractor (*see Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570, 571-572 [2d Dept 2020]; *Sanders v Sanders-Morrow*, 177 AD3d at 920, 922 [2d Dept 2019]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 [2d Dept 2016]). The testimony of the witnesses for Statewide and March Associates shows that Statewide was a subcontractor whose only role at the project site was to perform certain concrete demolition work, the purpose of which was to make room in the concrete slabs for air ducts and staircases. The testimony also shows that the work occurred over only a few days and that Statewide's employees had not been at the project site since April 2019, approximately six months prior to the plaintiff's alleged accident.

The plaintiffs oppose this branch of Statewide's motion. They rely on certain deposition testimony of the witnesses for Statewide and March Associates and the subcontract between Statewide and March Associates. Based on these submissions, the plaintiffs assert that there is an issue of fact as to whether Statewide is a proper Labor Law defendant because Statewide was delegated the authority to control the demolition and duct penetration work at the project site, and this work caused the floor in the area where the plaintiff's accident occurred to be broken and uneven. Indeed, the plaintiff testified that the floor in the area where he fell was generally uneven and unfinished. However, the plaintiffs do not point to any specific testimony or other evidence which demonstrates that Statewide's work caused or contributed to the uneven floor or otherwise

caused the galvanized pipe at issue to protrude from the floor. Thus, the plaintiffs' contention here is speculative and insufficient to raise an issue of fact.

This branch of Statewide's motion is therefore granted.

Labor Law § 200 and common-law negligence

"Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). Where an accident was caused by the manner in which the work was performed, "recovery against a property owner cannot be had 'unless it is shown that the [owner] had the authority to supervise or control the performance of the work' " (*Lazo v Ricci*, 178 AD3d 811, 813 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Conversely, "[w]here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a contractor may be liable in common-law negligence and under Labor Law § 200 only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it" (*Sotomayer v Metropolitan Transp. Auth.*, 92 AD3d 862, 864 [2d Dept 2012]).

Here, the parties' deposition testimony is sufficient to establish prima facie entitlement to summary judgment dismissing the plaintiffs' Labor Law § 200 and common-law negligence claims asserted against Statewide. To the extent that the plaintiffs allege, in their bill of particulars, that the accident involved the manner in which his work was performed, the plaintiff's testimony shows that Statewide did not supervise or control the manner of his work (*see Argueta v City of New York*, 223 AD3d 862, 864-865 [2d Dept 2024]). Similarly, to the extent that the plaintiffs allege that a defective premises condition contributed to his accident, Statewide's submissions demonstrate that its limited work at the project site did not cause or contribute to the plaintiff's accident (*see Navarro v City of New York*, 75 AD3d 590, 592-593 [2d Dept 2010]).

In opposition to this branch of Statewide's motion, the plaintiffs rely on the same unsubstantiated argument that Statewide's work created the exposed pipe which led to the plaintiff's alleged accident. However, for the same reasons as previously stated, this speculative argument is insufficient to raise an issue of fact.

This branch of Statewide's motion is therefore granted.

<u>The cross-claims asserted by Summit and March Associates</u>

A party's right to contractual indemnification is dependent on the specific language of the contract (*see O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). Thus, to establish prima facie entitlement to summary judgment dismissing a claim for contractual indemnification, a moving party must show that it was not contractually obligated to indemnify the party asserting the indemnification claim (*see Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 558

[2d Dept 2015]). This may be accomplished by showing that the indemnification clause at issue was not triggered or is otherwise inapplicable under the circumstances (*see Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 756 [2d Dept 2015]; *cf. Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 995-996 [2d Dept 2009]).

Here, the subcontract between March Associates and Statewide requires Statewide to indemnify Summit and March Associates against claims for, among other things, bodily injures that arises out of Statewide's performance of the work. As previously noted, Statewide's submissions are sufficient to demonstrate that the plaintiff's accident was not caused by Statewide's work (*see Gurewitz v City of New York*, 175 AD3d 658, 664 [2d Dept 2019]). Thus, Statewide's submissions are sufficient to establish prima facie entitlement to summary judgment dismissing the cross-claim for contractual indemnification.

Statewide's submissions also sufficiently establish prima facie entitlement to summary judgment dismissing the common-law indemnification and contribution claims. "A party can establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action for common-law indemnification, arising out of a workplace injury, asserted against it by establishing that it was not negligent, and that it did not have the authority to direct, supervise, or control the work giving rise to the injury" (*Council on Foreign Relations, Inc. v ABC Interiors Unlimited, Inc.*, 189 AD3d 1168, 1168 [2d Dept 2020]). Similarly, "[a] party moving for summary judgment dismissing a third-party cause of action for contribution establishes its prima facie entitlement to judgment as a matter of law by demonstrating that it did not owe or breach a duty of reasonable care to the plaintiff, or a duty of reasonable care independent of its contractual obligations" (*Carrillo v 457-467 Atl., LLC*, 193 AD3d 911, 913 [2d Dept 2021]). Here, for the reasons set forth above, Statewide's submissions sufficiently demonstrate that it was not negligent and that it did not have the authority to direct, supervise, or control the work which caused the plaintiff's accident (*see Carrillo*, 193 AD3d 912-913).

This branch of Statewide's motion is unopposed and is therefore granted.

The plaintiffs' motion (Sequence #3)

In support of their separate motion, the plaintiffs submit, among other things, the pleadings, the transcripts from the depositions of the plaintiff and the defendants' witnesses, photographs of the area where the accident occurred, and the subcontract between March Associates and Statewide. Based on these submissions, the plaintiffs assert that they are entitled to partial summary judgment as to liability on so much of their Labor Law § 241 (6) claim as is predicated on alleged violations of section 23-1.7 (e) of the Industrial Code because Summit and March Associates are proper parties under the Labor Law, the plaintiff was engaged in an enumerated activity at the time of his accident, the plaintiff's description of the accident demonstrates that the galvanized steel conduit pipe that he tripped over on constitutes a tripping hazard under section 23-1.7 (e), and the area where the plaintiff was working when his accident occurred is both a "passageway" and a "working area" for the purposes of these subsections sections 23-1.7 (e) (1) and (e) (2).

" 'Labor Law § 241 (6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed' " (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). "To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

As is relevant here, 12 NYCRR 23-1.7 includes the following:

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

In their motion, the plaintiffs effectively assert that a workplace accident can fall under both of these subsections and that the plaintiff's accident renders both provisions applicable. However, recent decisions from the Second Department show that the plaintiffs' position is untenable (*see Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 617 [2d Dept 2024]; *Dyszkiewicz v City of New York*, 218 AD3d 546, 548 [2d Dept 2023]). Moreover, during his deposition, the plaintiff explained that his accident occurred in one of the theaters at the project site and that the pipe which caused his fall was located past the base of a set of stairs in the theater. Thus, despite the plaintiffs' attempt to couch the area where the accident occurred as both a "passageway" and a "working area," the court finds that section 23-1.7 (e) (1) of the Industrial Code is inapplicable here (*see Stewart v Brookfield Office Props, Inc.*, 212 AD3d 746, 747 [2d Dept 2023]).

In addition, the plaintiffs submissions fail to demonstrate, prima facie, that section 23-1.7 (e) (2) of the Industrial Code is applicable. This provision "has no application if an object that a plaintiff trips over is permanent and an integral part of what was being constructed" (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]; see *O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2d Dept 2022]). Here, the photographs show that the protruding conduit which caused the plaintiff's accident was embedded within the concrete floor of the theater. Although the plaintiff testified that this exposed conduit was present throughout the work site, the plaintiffs did not present any evidence which shows what the purpose of this conduit was, whether it was to be incorporated into the design of the theater, or whether it was to be capped off and/or removed entirely. The plaintiffs therefore failed to demonstrate that the exposed conduit pipe was not an integral part of the construction.

Finally, to the extent that the plaintiffs seek summary judgment dismissing certain affirmative defenses asserted by the defendants, the plaintiffs merely raise a conclusory argument that because they are entitled to summary judgment as to liability on their Labor Law § 241 (6) claim, these affirmative defenses must also be dismissed. However, for the reasons set forth previously, this contention is insufficient to establish prima facie entitlement to summary judgment.

Under these circumstances, the defendants' opposition papers need not be addressed (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, it is

ORDERED that Statewide's motion for summary judgment dismissing the complaint and all cross-claims asserted against it (Sequence #3) is granted; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: OCT 04 2024

J.S.C.

HON. JOSEPH J. ESPOSITO

FILED
10/7/2024
COUNTY CLERK
QUEENS COUNTY